

June 18, 2015

The Dodd-Frank Act's Diversity Policy Encourages— But Does Not Mandate—Specific Employer Action

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The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹ (“Dodd-Frank Act” or “Act”) authorizes certain federal agencies to assess the “diversity policies and practices of the entities they regulate.”² On June 10, 2015, six federal agencies (“agencies”) issued a joint policy statement establishing standards for assessing those policies and diversity practices.³ While the policy statement provides a useful framework for identifying important components of an effective diversity and inclusion effort aimed at expanding employment and contracting opportunities for women and minorities and evaluating such progress, the analysis involves a voluntary compliance scheme that does not require employers to implement these standards.

The policy statement also defines key terms and indicates the limitations of its territorial reach. For example, diversity is defined narrowly as “women” and “minorities.”⁴ However, employers have the flexibility to include other groups within their diversity and inclusion efforts. The policy statement defines inclusion more broadly, however, as “a process to create and maintain a positive work environment that values individual similarities and differences, so that all can reach their potential and maximize their contributions to an organization.” By using this broader inclusion definition, the agencies remind employers of their obligations to apply policies and procedures equitably when making employment and contracting decisions. Finally, the policy statement makes clear that these standards apply only to an employer’s U.S. operations. However, employers may elect to apply the standards to their international operations.

1 124 Stat. 1376 (2010).

2 The diversity provision is §342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) codified at 12 U.S.C. 5452.

3 [*Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies*](#), 80 Fed. Reg. 33016 -33025 (June 10, 2015). The six agencies implementing the joint standards are Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Bank), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), Bureau of Consumer Financial Protection (CFPB), and the Securities and Exchange Commission (SEC). While the Department of Treasury, the Federal Housing Finance Agency and the Federal Reserve Banks also established OMWI’s, they did not jointly issue this policy statement because only “the federal financial agencies with regulated entities” issued the policy statement.

4 The author recognizes both that the category of “women” is not devoid of racial or ethnic identity (*i.e.* each woman has a racial or ethnic identity) and there are other preferred terms for “minorities” such as persons of color. Further, there are regions in the United States where groups traditionally considered “minorities” are actually the majority of a particular population. However, for purposes of this article, the terms identified in the policy statement will be used, including the definition of “minorities” as “Black Americans, Native Americans, Hispanic Americans and Asian Americans.”

Background

In 2010, Congress passed the Dodd-Frank Act. Section 342 of the Act established Offices of Minority and Women Inclusion (“OMWI”) at several federal agencies and also required them to establish standards, among other things, for “assessing the diversity policies and practices of entities regulated by [each] agency.”⁵ The agencies proposed standards on October 25, 2013, extended the comment period until February 7, 2014, and issued their final policy statement on June 10, 2015, effective immediately.⁶

The Specific Components of the Policy Statement

Standards

As a preliminary matter and as noted above, regulated employers are not obligated to implement the diversity and inclusion standards outlined in the policy statement. Yet, the policy statement identifies specific diversity and inclusion standards that employers may find useful either to initiate or to enhance supplier and workplace diversity and inclusion business strategies, policies and practices. The standards focus on five areas:

- Promoting Organizational Commitment to Diversity and Inclusion;
- Evaluating and Improving Workforce Profiles and Employment Practices;
- Improving Procurement and Business Practices Related to Supplier Diversity;
- Promoting Practices that Make Workforce and Supplier Diversity and Inclusion Efforts Transparent and Public; and
- Conducting Annual Self-Assessments and Disclosing Related Information

For each category, the agencies first outline their reasons for identifying the topic as an important component of an overall successful diversity and inclusion strategy. The agencies then provide examples of specific actions—called standards—that a regulated employer could take to advance its diversity and inclusion employment and contracting efforts. Key components of these standards are discussed in greater detail below.

Promoting Organizational Commitment to Diversity and Inclusion

The policy statement presumes that progress on diversity and inclusion efforts related to employment and contracting occurs when an organization’s leadership, including its Board of Directors, is fully engaged. To that end, the standards anticipate that an employer’s senior leadership team and Board will both approve and support a diversity and inclusion policy and receive regular progress reports on the effectiveness of such a program. Notably, the regulation does not define the nature of the anticipated “support,” how often progress reports should be provided in order to constitute “regular” reporting or what specific information should be included in these progress reports.

Moreover, the policy statement focuses on giving employers tools for creating and sustaining cultures that support diversity and inclusion strategies. These standards include ensuring that diversity and inclusion considerations are components of an employer’s strategic plan; taking proactive steps to promote diverse pools of candidates when making employment decisions at all levels of the organization, including for Board positions; selecting an executive-level person with both the skills and knowledge necessary to manage and direct diversity and inclusion efforts and providing dedicated resources to support those efforts; and conducting regular training and offering educational opportunities about equal employment opportunity and diversity and inclusion throughout the organization.

Evaluating and Improving Workforce Profiles and Employment Practices

The agencies also appear to balance two interests that are sometimes misinterpreted as competing. On one hand, employers are encouraged to take proactive, measurable steps to increase employment opportunities for women and minorities. On the other, they are reminded to do so in ways that are lawful and satisfy pre-existing obligations under various laws. The standards provide a framework for accomplishing both objectives.

⁵ §342 (b)(2)(C).

⁶ See *Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies*, 78 Fed. Reg. 64052-64057 (Oct. 25, 2013); and 78 Fed. Reg. 77792-77793 (Dec. 24, 2013) (comment period extension).

Regarding measureable indicia of whether an employer's diversity and inclusion workplace efforts are effective, the agencies encourage employers to consider evidence of "both quantitative and qualitative measurements." The idea is to collect various data—such as information related to "applicant tracking, hiring, promotions, separations (voluntary and involuntary), career development and retention" at all levels of an organization and to assess trends, successes and areas of opportunity. While the agencies do not define specific tools to use for gathering and assessing this information, they do acknowledge that certain employers already have recordkeeping and reporting obligations under applicable laws. For example, Title VII of the Civil Rights Act of 1964 requires most employers with at least 100 employees to file EEO-1 reports annually and regulations implementing Executive Order 11246 mandate that most government contractors file affirmative action plans. While the agencies encourage these employers—and others not subject to either requirement—to "use other analytical tools that they may find helpful," these Dodd-Frank policy standards do not change those pre-existing legal obligations.

Further, employers are reminded that decisions impacting all employees and applicants must be made without engaging in unlawful employment discrimination based on gender, race and ethnicity. In short, race or gender-based conduct considered unlawful prior to implementing these standards remains unlawful. The agencies identify strategies for creating internally and externally diverse applicant pools via a host of outreach efforts to organizations, educational institutions and business conferences serving significant minority and women populations. Presumably, the agencies—at least by inference—have determined these types of outreach activities are not unlawful under existing law. The agencies also support holding managers accountable for supporting diversity and inclusion efforts via "individual performance plans." On this point, however, no further explanation is offered.

Improving Procurement and Business Practices Related to Supplier Diversity

The agencies also are focused on providing fair opportunities for minority-owned and women-owned businesses to "compete for procurement of business goods and services." To do that, the standards outline a multi-tiered approach. First, employers are encouraged to have a "supplier diversity policy" permitting minority- and women-owned businesses to bid on "contracts of all types." Second, these regulated employers may assess their overall contracting and procurement spending to determine the total dollars awarded to suppliers, including the percentages of contract dollars and contracts awarded to diverse contractors and subcontractors. Finally, the agencies address the need for employers to "promote a diverse supplier pool" by both enhancing outreach efforts to diverse suppliers and publicizing available contract opportunities.

Promoting Practices that Make Workforce and Supplier Diversity and Inclusion Efforts Transparent and Public

With a nod to the availability of various technology platforms to disseminate information to the public, the agencies encourage regulated employers to use their "Web site[s] or other appropriate communication methods" to publicize both their strategic plans and other policies demonstrating a commitment to diversity and inclusion and their progress toward achieving diversity and inclusion in their workforce and procurement activities. Finally, employers are encouraged to inform the public of current and future employment and contract procurement opportunities and to highlight the availability of mentoring and development programs for employees and contractors.

Conducting Annual Self-Assessments and Disclosing Related Information

In this section of the policy statement, the agencies encourage employers to use the standards as a measuring stick against which they assess their diversity and inclusion policies, procedures and progress on an annual basis. Employers are then asked to provide self-assessment information to their primary regulator's OMWI Director and to otherwise "publish[]" this information.

For many employers, the notion of disclosing their confidential diversity and inclusion self-assessments to the public and to regulators likely is the most troubling aspect of the policy statement. In apparent recognition of that concern (which includes the potential use by plaintiffs of such data in litigation), the agencies offer employers incentives for self-disclosure: employers—not the agencies—may conduct the assessments, and employers may designate submitted information as "confidential, commercial information." The agencies "will follow the Freedom of Information Act" when responding to others' requests for an employer's self-assessments. However, there is no guarantee that an employer's designation of its self-assessments as confidential, commercial information will shield such information from wide-spread disclosure in response to FOIA requests.

Other Important Considerations

As mentioned, adhering to the standards outlined in the policy statement is a voluntary decision for employers. To underscore the voluntary nature of these standards, the policy statement also highlights that the agencies “will not use their examination or supervisory processes” for assessing employer efforts. It remains unclear when—and via which process—agencies will evaluate the regulated entities’ diversity and inclusion policies and practices. However, it is clear that the OMWI Directors for an employer’s primary regulatory agency retain authority to “reach out to regulated entities and other interested parties to discuss diversity and inclusion practices and methods of assessment.”

In response to these agency overtures, employers should consider the most optimal methods for preparing for and responding to such communications, including having sufficient qualitative and quantitative information for framing their workforce and procurement diversity and inclusion efforts and related progress. However, such information has to be prepared carefully to avoid potential liability. Employers should discuss with qualified counsel how to encourage and support diversity and inclusion without creating potential legal problems.

The agencies have not yet determined whether—and to what extent—they will collect regulated entities’ data. In fact, the agencies are specifically soliciting public comments on a host of data collection-related issues, including whether they should collect data and, if so, in what format. The agencies also are determining whether there are vendors capable of processing the collected data so that it could be assessed in a useful manner and, if so, the anticipated costs associated with those hosting and processing services. Thus, whether the agencies have sufficient capacity to assess the information meaningfully—even if it were voluntarily provided—remains an unanswered question.

Employer Considerations

Overall, the standards—with the exception of the components encouraging disclosure of self-assessments to the public and agencies—contain traditional elements of a diversity and inclusion framework that are likely familiar to a host of employers already engaged in diversity and inclusion employment and contracting efforts. For those employers, the standards may operate as a simple checklist helping to determine whether their existing efforts already include some of the useful strategies contained in the standards and, if not, evaluating whether to incorporate them into their existing frameworks. For other employers that may be in the early stages of their diversity and inclusion efforts—or have not yet begun them—the standards may operate as a useful starting point for identifying key components of a diversity and inclusion strategy.

In either instance—incorporating additional strategies into existing diversity and inclusion frameworks or beginning diversity and inclusion efforts anew—it is critical to consult with outside counsel to assess the potential impact of various strategies. In some instances, strategies may unintentionally run afoul of existing law or a company’s data may require additional analysis either to ensure accuracy or to help employers focus on a particular component of their overall diversity and inclusion strategy.